In the

Supreme Court of the United States.

OCTOBER TERM, 1941.

No. 497

LEONARD L. EDWARDS,
Petitioner,

v.

BINGHAM PUMP COMPANY, INC., a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT
AND
BRIEF FOR PETITIONER
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Leonard L. Edwards, plaintiff, respectfully prays for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit to review a judgment of that Court entered May 13, 1941, denying plaintiff's petition for rehearing.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

The material and essential facts are:

This action was brought by petitioner Feb. 24, 1934, in the United States District Court for the District of Oregon to enjoin infringement of Letters Patent No. 1,927,395 granted to himself Sept. 19, 1933, for Gear Pumps (R. p. 1).

The District Court referred the case to a Master (R. p. 21), who heard the evidence, *and after full trial on the merits,* entered a Report, Sept. 4, 1935 (R. p. 23), finding the patent valid and infringed. Respondent excepted Sept. 24, 1935, to the Master's findings as to infringement, *but not as to validity of the patent* (R. p. 48). Respondent's Exceptions were overruled (R. p. 55) and an Interlocutory Decree ordering an injunction and an accounting was entered by the District Court, *January 20, 1936* (R. p. 61). Respondent's Petition for Rehearing, filed Jan. 22, 1936 (R. p. 65), Motion to Remand to Master filed Jan. 29, 1936 (R. p. 77), and Supplementary Petition for Rehearing filed Feb. 10, 1936 (R. p. 40) were denied by the Court *March 23, 1936* (R. p. 84). *Respondent did not appeal from the Interlocutory Decree of January 20, 1936, at any time,* although it could have done so within thirty days, under Title 28 U.S.C. Sec. 227, and 227a. On *April 27, 1936,* no appeal from the Interlocutory Decree having been taken in the meantime, the parties started taking testimony before the Master in the accounting, which testimony was concluded May 14, 1936 (R. pp. 130–131). On May 25, 1936 (R. p. 85), Respondent filed a Petition to Reopen and to File an Amended Answer, which was referred to the Master June 1, 1936 (R. p. 118), to report thereon in connection with his report on the accounting. The Master reported June 24, 1936 (R. pp. 129 and 153), denying the Petition to Reopen and finding damages of $3120. The District Court (Judge Fee succeeding Judge McNary, who had died in the meantime), March 20, 1939 (Opinion R. p. 217), affirmed the Master's rulings but increased the damages awarded to $8500, and a Final Decree in accordance therewith (R. p. 242) was entered Oct. 9, 1939.

Respondent appealed from the Final Decree on Dec. 5, 1939 (R. p. 244). The Circuit Court of Appeals for the Ninth Circuit, March 13, 1941, rendered an Opinion (R.

p. 786, reported in 118 F. (2d) 338) finding the patent invalid and dismissing the bill. A Decree in accord was entered the same day (R. p. 793). Petitioner on April 24, 1941, within the time allowed therefor by rule of Court (R. p. 794), filed a petition for rehearing, which was denied May 13, 1941 (R. p. 794).

The Court of Appeals rejected petitioner's contentions (A) that the questions of validity and infringement of the patent were not open for consideration, *having been waived by respondent's failure to appeal from the Interlocutory Decree* (entered *after final hearing*, and, in fact, *final*, except for the accounting), and that the Court was without jurisdiction to consider them, and that the only question was whether the award of $8500 damages under the accounting was correct and proper; and (B) that respondent could not contest validity of the patent because it failed to except to the Master's findings as to validity, as required by Equity Rule 66 in force at that time, and the Court held that the Rules of Civil Procedure (Rule 52b) no longer required such exceptions, and gave the Rules a retroactive effect three years prior to their actual operation.

A). The Failure to Appeal From the Interlocutory Decree.

The decision of the Court of Appeals on this question is directly contrary to the express intent and purpose of Congress in permitting appeals from interlocutory decrees, and decrees which are final except for the ordering of an accounting, under 28 U.S.C. Sec. 227 and 227a.

The appeal statutes here involved are Title 28 U.S.C. Sec. 227 and 227a which read (so far as here material):

> "Section 227. Where, upon a hearing in a district court, . . . an injunction is granted, continued, modified, refused, or dissolved by an interlocutory order or decree, or an application to dissolve or modify an in-

junction is refused, or an interlocutory order or decree is made appointing a receiver, or refusing an order to wind up a pending receivership or to take the appropriate steps to accomplish the purposes thereof, such as directing a sale or other disposal of property held thereunder, an appeal may be taken from such interlocutory order or decree to the circuit court of appeals; and sections 346 and 347 of this title shall apply to such cases in the circuit courts of appeals as to other cases therein. The appeal to the circuit court of appeals must be applied for within thirty days from the entry of such order or decree, and shall take precedence in the appellate court; and the proceedings in other respects in the district court shall not be stayed during the pendency of such appeal unless otherwise ordered by the court, or the appellate court, or a judge thereof. The district court may, in its discretion, require an additional bond as a condition of the appeal." . . .

"Section 227a. When in any suit in equity for the infringement of letters patent for inventions a decree is rendered which is final except for the ordering of an accounting, an appeal may be taken from such decree to the circuit court of appeals; Provided, That such appeal be taken within thirty days from the entry of such decree or from February 28, 1927; and the proceedings upon the accounting in the court below shall not be stayed, unless so ordered by that court, during the pendency of such appeal." (Feb. 28, 1927, c. 228, 44 Stat. 1261.)

The Respondent could have appealed from the Interlocutory Decree of Jan. 20, 1936, entered after final hearing, and which was also final except for the ordering of an accounting, under either Section, at any time within 30 days, and obtain a

full hearing on the merits. Failing to do so, it caused Petitioner to proceed with the accounting, at an expense to himself of $3250—a wholly needless and avoidable expense, if Respondent had appealed from the Interlocutory Decree, as it should have done.

The express intent and purpose of Congress in 1891 in permitting appeals from interlocutory decrees granting injunctions in Sec. 227, was to *prevent the great delay and expense to the parties of useless accountings,* if the Court of Appeals should hold the Plaintiff's bill without merit and thus reverse the District Court, which *after final hearing* had ordered the injunction and accounting. Previously the defendant could appeal only from the *final decree after* the accounting. Great hardship and expense to litigants resulted from *unnecessary accountings* and in 1891 the appeal statute was amended to correct that very situation.

Sec. 227a was enacted in 1927 to prevent *unnecessary accountings* in the special situation where the patent had expired pending suit, and no injunction could accordingly be granted, and the defendant thus could not appeal from the interlocutory decree (final except for the ordering of an accounting) under Sec. 227. The language of Sec. 227a is broad enough, however, to have permitted Respondent to appeal in the present case, had it so desired, even though the patent had not expired and an injunction was granted.

The decision is in conflict with the decision of this Court in an analogous situation:

> *Ensten* v. *Simon, Ascher & Co.,* 282 U.S. 445 at 457–8 (1930),

and also in conflict with a decision of the Circuit Court of Appeals of the Eighth Circuit:

> *Austin-Western Machinery Co.* v. *Disc Grader Co.,* 291 Fed. 301 at 303 (C.C.A. 8, 1923),

and is also in conflict with a previous decision of the Ninth Circuit, not mentioned in the Court's Opinion here nor expressly overruled:

O'Nate v. *Bahr,* 67 F. (2d) 180 at 181 (C.C.A. 9, 1933).

The decision also construes the Appeal Statutes in conflict with the following fundamental and long established principles of appellate procedure and review:

a). That a party who fails to appeal from an appealable decree, or who fails to raise questions on a previous appeal which he could have raised, *waives his right to be heard thereon and cannot raise the same questions in any subsequent appeal.*

b). That where separate appeals are permitted in various stages of a litigation, questions decided on the first appeal (or which could have been decided) will not be re-examined on the second appeal. The second appeal brings up nothing but the proceedings subsequent to the mandate on the first appeal.

c). That fragmentary or piecemeal appeals in the same litigation raising different points successively on the same record will not be permitted.

B). The Failure to Except to the Master's Report.

The Court of Appeals, in permitting Respondent to contest validity of the patent, after failing to except to the Master's findings thereon in Sept., 1935, as required by the then existing Equity Rule 66, has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

It is settled, of course, beyond any dispute by the decisions of this Court and other Courts of Appeal, that under established equity practice and Federal Equity Rule 66, a party cannot raise questions in a Court of Appeals on which he has failed to except in the Master's report.

The decision of the Circuit Court of Appeals giving a retroactive effect to the Rules of Civil Procedure (52b) effective Sept. 16, 1938, to relieve Respondent from the necessity of excepting to the Master's report filed three years previous, is in conflict with the decisions of the Ninth Circuit itself and other Circuit Courts of Appeal in:

Hill v. *Ohio Casualty Ins. Co.,* 104 F. (2d) 695, at 696 (C.C.A. 6, 1939);

Nielson v. *Utah Construction Co.,* 104 F. (2d) 887, at 892 (C.C.A. 9, 1939);

Leach v. *Ross Heater & Mfg. Co.,* 104 F. (2d) 88 at 90 (C.C.A. 2, 1939);

Schlaefer v. *Schlaefer,* 112 F. (2d) 177 at 181–182 (C. A. D.C. 1940).

QUESTIONS RAISED BY THE CASE.

The case, therefore, raises the following questions:

1. May a party, who *after final hearing,* fails to appeal within 30 days from an interlocutory decree granting an injunction, or from a decree whch is final except for the ordering of an accounting, as permitted by Title 28 U.S.C. Secs. 227 and 227a, *and causes his opponent to proceed with the accounting,* thereafter appeal from the final decree after accounting, and raise the same questions as to the merits of the plaintiff's claim which he might have raised on an appeal from the interlocutory decree (or decree which is final except for the accounting), or is he limited to matters arising in the accounting and occurring subsequent to the interlocutory decree (or decree which is final except for the accounting)?

2. In other words, does a defendant who, *after final hearing,* can appeal from an interlocutory decree granting an injunction, or from a decree which is final except for the ordering of an accounting, under Title 28, Secs.

227 and 227a, and obtain a complete review of the merits of the plaintiff's claim, and can thereby prevent the delay and expense of an unnecessary accounting, if the plaintiff's claim is not sustained by the Court of Appeals, but who fails to avail himself of his right to appeal, *and thereby causes the plaintiff to proceed with the accounting,* waive his right to be heard as to the merits of the plaintiff's claim, and limit himself to an appellate review only of the award of damages and profits on accounting on his appeal from the final decree after accounting?

3. Or, in other words, is Title 28, U.S.C. Secs. 227 and 227a to be construed as permitting a party, *after final hearing,* to withhold his appeal on the merits until after he has put his adversary to the trouble and expense of an unnecessary accounting, *contrary to the express purpose of Congress* in permitting appeals from interlocutory decrees, and decrees which are final except for the ordering of an accounting, under Secs. 227 and 227a?

4. Are the new Rules of Civil Procedure, and particularly Rule 52(b) thereof, which became effective Sept. 16, 1938, retroactive in their operation to relieve a defendant from the necessity of excepting within 20 days to a Master's Report filed Sept. 4, 1935, as required by the then existing and applicable Equity Rule 66?

These important questions of Federal law *under Title 28, U.S.C. Secs. 227 and 227a,* have never been passed upon by this Court. It is of utmost importance that they should be. These questions have troubled the Circuit Courts of Appeals since 1891 and a proper answer is essential to the orderly and efficient administration of justice, in both trial and appellate Federal courts, in preventing the great waste and delay of useless accountings, and in preventing the overcrowding of the already over-burdened Circuit Courts of Appeals with unnecessary fragmentary and piecemeal appeals.

The decision of the Court of Appeals in relieving Respondent of the necessity of excepting to the Master's Report as to validity of the patent, as required by the then existing Equity Rules, by applying the new Rules of Civil Procedure not effective until three years later, is so contrary to settled law and practice, and so far a departure from the accepted and usual course of judicial proceedings, as to clearly require the intervention of this Court, we respectfully submit.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Your Petitioner respectfully prays that the Writ be allowed for the following reasons:

1. Because the decision of the Circuit Court of Appeals herein disregards, and is contrary to, the express intent of Congress in permitting appeals under Title 28, U.S.C. Secs. 227 and 227a.

2. Because the decision herein is in conflict with the decision of this Court in *Ensten* v. *Simon, Ascher & Co.,* 282 U.S. 445 at 457–8 (1930) in an analogous situation.

3. Because the decision of the Circuit Court of Appeals herein is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Austin-Western Machinery Co.* v. *Disc Grader Co.,* 291 Fed. 301–303 (C.C.A. 8, 1923) and with its own previous decision in *O'Nate* v. *Bahr,* 67 F. (2d) 180–181 (C.C.A. 9, 1933) not referred to herein nor expressly overruled.

4. Because the Circuit Court of Appeals herein has improperly construed Title 28, U.S.C. Secs. 227–227a in a manner conflicting with fundamental and long established principles of appellate procedure.

5. Because the public interest in the avoidance of unnecessary accountings and fragmentary and piecemeal appeals, with the great waste of time of courts, masters

and litigants, and the needless expense caused thereby, and in the prompt and efficient administration of justice, in both trial and appellate courts, requires that the question as to the effect of failure to appeal from an interlocutory decree involving an injunction, and which is final except for the ordering of an accounting, under 28 U.S.C. Secs. 227 and 227a, be settled.

6. Because it thus appears that an important question of Federal law and procedure is presented, which has not been, but should be expressly decided by this Court.

7. Because the Court of Appeals, in relieving Respondent of the necessity of excepting to the Master's Report, as required by the Equity Rules in force at that time, and giving retroactive effect to the Rules of Civil Procedure not effective until three years after the Master's Report in qustion, has so far departed from the accepted and usual course of judicial proceedings as to require the exercise of this Court's powers of supervision.

8. Because the decision of the Court of Appeals herein as to respondent's failure to except to the Master's Report on validity of the patent is contrary to the decisions of that Court itself and other Circuit Courts of Appeal, in *Hill* v. *Ohio Casualty Ins. Co.*, 104 F. (2d) 695, at 696 (C.C.A. 6, 1939); *Nielson* v. *Utah Construction Co.*, 104 F. (2d) 887, at 892 (C.C.A. 9, 1939); *Leach* v. *Ross Heater & Mfg. Co.*, 104 F. (2d) 88 at 90 (C.C.A. 2, 1939); and *Schlaefer* v. *Schlaefer*, 112 F. (2d) 177 at 181–182 (C.A.D.C. 1940).

PRAYER.

WHEREFORE, your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and

complete transcript of record and all proceedings in the case numbered and entitled on its docket No. 9485, Bingham Pump Company, Inc., a corporation, Defendant-Appellant *v.* Leonard L. Edwards, Plaintiff-Appellee, and that the said Decree of the Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court, and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your Petitioner will ever pray.

LEONARD L. EDWARDS, *Petitioner,*
by GEORGE P. DIKE,
CEDRIC W. PORTER,
Attorneys.

JOHN F. MCCARTHY,
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TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
NINTH CIRCUIT.

BRIEF FOR PETITIONER
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

This Petition is brought to review a decision of the Circuit Court of Appeals for the Ninth Circuit in a patent infringement suit. The decision, written by Judge Haney, and reported in 118 F. (2d) 338 (R. p. 786), reversed the decision of the District Court holding the patent valid and infringed, on respondent's appeal from the final decree after accounting, despite respondent's failure to appeal from the interlocutory decree *after final hearing* and before accounting, as respondent could have done until Tit. 28 U.S.C. Secs. 227 and 227a, and despite respondent's failure to except to the Master's findings as to validity of the pat-

ent. The Court of Appeals held the patent invalid and dismissed the bill.

A sufficient statement of the case, we believe, appears in the Petition, under Summary and Short Statement of the Matter Involved.

JURISDICTION.

The date of the judgment to be reviewed is the date of the judgment of the Circuit Court of Appeals denying petitioner's petition for rehearing, May 13, 1941 (R. p. 794). The statute giving jurisdiction is Sec. 240a of the Judicial Code, Tit. 28 U.S.C. Sec. 347, as amended by the Act of Feb. 13, 1925. Jurisdiction of patent infringement suits is sustained in *Simmons* v. *Grier,* 258 U.S. 82.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in considering the questions of validity and infringement of the patent on defendant's appeal from the final decree after accounting, these questions having been waived by respondent's failure to appeal from the interlocutory decree *after final hearing* and before accounting.

2. The Circuit Court of Appeals erred in not holding that it had no jurisdiction to consider the questions of validity and infringement of the patent, by reason of respondent's failure to appeal from the interlocutory decree granting the injunction and accounting *after final hearing.*

3. The Circuit Court of Appeals erred in holding that it was not precluded from considering the question of validity of the patent because of respondent's failure to except to the Master's findings as to validity.

4. The Circuit Court of Appeals erred in reversing and in not affirming the District Court as to validity and infringement of the patent.

SUMMARY OF ARGUMENT.

The argument is summarized in the Petition, in the Reasons Relied on for the Allowance of the Writ, page 9.

ARGUMENT.

A. THE EFFECT OF FAILURE TO APPEAL FROM THE INTERLOCUTORY DECREE (FINAL EXCEPT FOR ACCOUNTING).

As to this, the Court of Appeals, by Judge Haney (Opinion R. pp. 789–790) said:

> "With respect to the suggestion that the question as to the validity of the patent is not open because of a failure to appeal from the interlocutory decree as permitted by 28 USCA Sec. 227a, we think the same rule is applicable, to that section as is applicable to Sec. 227, and that therefore appellant was not required to appeal from the interlocutory decree. *Victor Talking Mach. Co.* v. *George,* 3 Cir., 105 F. (2d) 697, 699."

Point 1. The Court of Appeals has Construed Title 28 U.S.C. Secs. 227 and 227a in a Manner Contrary to the Express Intent of Congress, and as to Defeat the Purpose of Congress in Permitting Appeals from Interlocutory Decrees in Specified Instances, and from Decrees which are Final Except for Accounting.

Sec. 227. The intent and purpose of Congress in permitting appeals from interlocutory decrees granting injunctions in Title 28 U.S.C. Sec. 227 was *to prevent the great delay and expense to the parties of unnecessary accountings, if the Court of Appeals should find the plaintiff's bill without merit.*

Prior to the establishment of the Circuit Courts of Appeal in 1891, this Court had no jurisdiction to entertain an appeal from an interlocutory decree, even after final hear-

ing, as in a patent case, when an accounting of damages and profits was ordered.* Appeals could be taken only from final decrees,** *after accounting.*

The result was a great hardship to the defendant against whom an erroneous decree was rendered in the Circuit Court, in that he was put to the needless expenditure of a prolonged accounting, as well as being kept under injunction, before the Supreme Court could reverse the Circuit Court on appeal from the final decree after accounting.*** Congress endeavored to remedy this situation in the Act of March 3, 1891, c. 517, 26 Stat. 828, establishing the Circuit Courts of Appeals, in Sec. 7 thereof, which permitted an appeal from an interlocutory decree 'granting or continuing' an injunction, if taken within 30 days from the entry of the decree.

Thus the appeal, with complete review on the merits, was permitted before the accounting, instead of after. The accounting (necessary to a final decree) was eliminated as a prerequisite to the appeal and complete review on the merits—but otherwise the situation was unchanged. There still had been a complete trial and final hearing in the District Court; the decree entered was in fact final, except for accounting (although still "interlocutory", because the accounting remained). But, the appeal on the merits was merely advanced —to eliminate a useless accounting—if the Court of Appeals

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* *Barnard* v. *Gibson*, 7 How. 650 (1849).
Humiston v. *Stainthorp*, 2 Wall. 106 (1864).
Keystone Iron Company v. *Martin*, 132 U.S. 91 (1889).
McGourkey v. *Toledo & Ohio Railway Co.*, 146 U.S. 536 at 545 (1892).
Smith v. *Vulcan Iron Works*, 165 U.S. 518 at 524 (1896).

** The Judiciary Act of 1879, Act of Sept. 24, 1879, C. 20, Secs. 13, 22; 1 Stat. 81, 84.
Act of March, 1803, C. 40, 2 Stat. 244.
Rev. Stats. Secs. 691, 692, 699, 701.

*** An example of this situation is *Clark Thread Company* v. *Willimantic Linen Co.*, 140 U.S. 481, 482 (1890) where the interlocutory decree was entered in the Circuit Court in May, 1879, the accounting continued until June, 1886 when damages of $150,000 were awarded with attendant large legal expense. The Supreme Court on appeal from the final decree then reversed the Circuit Court and dismissed the bill, holding the patent invalid.

should not sustain validity or infringement of the patent. Two opportunities for appeal on the merits, before and after the accounting, were not intended to be provided—as the Court of Appeals herein has ruled.

The purpose of Section 7 was thus stated by Mr. Justice Gray in *Smith* v. *Vulcan Iron Works,* 165 U.S. 518 at page 525:

> *"The manifest intent of this provision, read in the light of the previous practice in the courts of the United States, contrasted with the practice in courts of equity of the highest authority elsewhere, appears to this Court to have been, not only to permit the defendant to obtain immediate relief from an injunction, the continuance of which throughout the progress of the cause might seriously affect his interests;* **but also to save both parties from the expense of further litigation, should the appellate court be of opinion that the plaintiff was not entitled to an injunction because his bill had no equity to support it."**

Appellant's brief in *Richmond* v. *Atwood,* printed in 52 F. 10 at pages 15–16 (C.C.A. 1, 1892), thus states the situation:

> "No compensation could ever be awarded to the defendant in the above case (*Clark Thread Co.* v. *Williamantic Linen Co.,* 140 U.S. 481) for being unjustly deprived by injunction of the use of a valuable construction for seven years, *nor could any of the large sums expended in useless fees during the accounting be recovered. This hardship has long been a matter of complaint among the members of the bar who practice in patent cases; and it was a cause of general satisfaction that congress, in section 7 of this act, had attempted, as was supposed by the bar, to remedy this hardship by allowing an appeal to be taken at once*

from the interlocutory decree granting the injunction.

. . .

We submit that there can be little doubt of the intention of congress. The evil complained of was the great delay of appeals during the accounting before the master . . . *Congress certainly intended to provide that the action of a circuit court in granting an injunction at final hearing may be reviewed by the appellate court before the long and expensive process of taking accounts before the master is completed, as is the established practice of the English court of chancery and many other equity courts.*"

See also Judge Aldrich's statement in the same case, 52 F. 10 at page 22.

The very purpose of Congress in permitting appeals from interlocutory decrees in the instances now specified in Tit. 28 U.S.C. Sec. 227 is defeated, however, if the construction placed upon the statute by the Circuit Court of Appeals herein is permitted. The present case is a grievous illustration of it. Here respondent could have appealed within 30 days from the interlocutory decree, *entered after final hearing,* granting the injunction and accounting, and secured a complete review on the merits in the Court of Appeals. But it failed to appeal. Petitioner, of course, could not appeal from the favorable decree. Respondent thus compelled petitioner to proceed with the accounting, at a cost of $3250 to petitioner—an expense which is wholly wasted and a great hardship to petitioner if respondent can now question the validity and infringement of the patent, on appeal from the final decree after accounting. By failing to appeal from the interlocutory decree, respondent should be held to have *waived* his right to be heard on the questions of validity and infringement, in accordance with settled principles of appellate procedure. Merely by *failing to appeal* from the interlocutory decree, a defendant compels the same unnecessary accounting as he did prior to 1891, when he *could not*

appeal, except from the final decree. Congress remedied that situation by providing the *opportunity* to appeal. It remains for the Courts now to give effect to the intent of Congress in the situation where the defendant, who fails to appeal, causes the same unnecessary accounting.

Sec. 227a. By various amendments to Section 227, either party could appeal from interlocutory decrees granting or denying an injunction, and fragmentary appeals could be prevented in all situations—except where the patent had expired pending suit, and hence no injunction could be granted. To remedy this situation, Title 28, U.S.C. Sec. 227a was enacted in 1927.

The intent of Congress in passing this legislation is clearly shown in *Senate Report 1319,* 69th Congress, 2d Sess. (accompanying Senate Bill 4957, which became Title 28, U.S.C. Sec. 227a), which states in part:

> "Under the present statutes where an equity suit for infringement of letters patent results in a decree for the plaintiff, if the patent at the time of entry of the decree is still alive, the court orders an injunction to issue to restrain further infringement, and refers the cause to a Master to ascertain plaintiff's damages and defendant's profits. Upon the entry of such a decree an appeal from the Order granting the injunction may be taken immediately and it is the general practice to suspend all proceedings under the accounting until the court of appeals has determined the questions of validity of the patent and infringement. If the court holds against the plaintiff on either of those questions, it reverses the decree of the lower court, and there is, of course, no accounting.
>
> If the patent expires before the entry of the decree is ordered, there can be under the present statutes, no appeal until after the accounting is completed and a final decree is entered. If then on appeal, the court

of appeals determines that the patent is invalid, or is not infringed, *the whole expense of the accounting is wasted.*

This bill . . . has been prepared for the purpose of permitting an appeal to be taken immediately in those cases where the patent has expired before the decree is entered in the trial court."

See also:

House Report 1890 (69th Congress, Second Session) reporting corresponding House Bill 11840.

Brick v. *A. I. Namm & Sons,* 21 F. (2d) 179 at 180 (D.C.E.D. New York, 1927).

The language of Section 227a is broad enough, however, to permit any defendant, as here, to appeal from the decree (final except for the accounting) even though the patent has not expired and an injunction is granted.

The defendant, who fails to appeal in such a situation and compels the plaintiff to proceed with the accounting, defeats the purpose of Sec. 227a as well as Sec. 227.

Point 2. The Decision of the Court of Appeals Is In Conflict with the Decision of This Court in Ensten v. Simon, Ascher & Co., 282 U.S. 445 (1930) in an Analogous Situation.

In this case, a patent infringement suit, the District Court had entered an interlocutory decree *after final hearing* holding certain claims valid and infringed and another claim invalid, and ordering an injunction and accounting. The defendant appealed from the interlocutory decree, but the plaintiff, who could have done so under Title 28, U.S.C. Sec. 227 failed to appeal. The Court of Appeals approved the decree so far as challenged. The plaintiff failed to disclaim the invalid claim until after the accounting, and the validity of the patent was then challenged for unreasonable neglect or delay to enter a disclaimer under the disclaimer statute

(Title 35, U.S.C. Secs. 65, 71). The plaintiff argued that Title 28, U.S.C. Sec. 227 gave it the right or option to await the final decree after accounting before appealing or disclaiming. This Court rejected the argument and said (by Mr. Justice McReynolds, pp. 457–8):

> "Certainly, in this case where an appeal was taken by the defendants, it would have entailed no unreasonable hardship upon the patent owner promptly to have submitted the legality of the rejected claim for determination by the appellate court. The route to that end was obvious, easy, inexpensive. He deliberately failed to defend his assertion of right by appealing. He has been guilty of unreasonable delay and has not brought himself within the beneficient provisions of the statute."

See to the same effect:

> *Ensten* v. *Rich-Sampliner Co.,* 13 Fed. (2d) 132, (D.C.N.D. Ohio E.D. 1926), reversed on another point 19 Fed. (2d) 66 (C.C.A. 6, 1927).

In other words, the plaintiff's alleged *option* of two opportunities to appeal on the merits was not permitted to conflict with the policy of the disclaimer statute. By failing to appeal from the interlocutory decree, the plaintiff lost the benefits of the disclaimer statutes. By the same token, the respondent here, by failing to appeal from the interlocutory decree, and putting petitioner to the expense of a needless accounting, has lost and waived the benefits of an appeal on the merits and the right to be heard on the questions of validity and infringement of the patent.

Point 3. The Decision of the Court of Appeals Is In Conflict with a Decision of the Circuit Court of Appeals for the Eighth Circuit, and Even with One of Its Own Previous Decisions Not Overruled.

(a) In the 8th Circuit.

In *Austin-Western Machinery Co.* v. *Disc Grader Co.*, 291 Fed. 301 (C.C.A. 8, 1923), the defendant failed to appeal from the interlocutory decree finding the patent valid and infringed and ordering an injunction and accounting. After the accounting the defendant appealed from the final decree and attempted to raise the point that there had been no proof of notice of infringement nor of marking "patented" on plaintiff's devices. The Court of Appeals held the defendant had waived this point by failing to appeal from the interlocutory decree entered pursuant to mandate (the District Court having been previously reversed on the merits). Judge Johnson said (p. 303):

> "*By this long-continued silence appellant waived the point;* besides, appellant is concluded by the decree of the court below entered upon the mandate of this court. . . . *That decree,* entered on the 21st day of February, 1919, *appellant has not appealed from.* Appellant has only appealed from the judgment on the accounting entered on the 29th day of March, 1922."

(b) The 9th Circuit.

In *O'Nate* v. *Bahr,* 67 F. (2d) 180 (C.C.A. 9, 1933) the defendant failed to appeal from the interlocutory decree finding the patent valid and infringed and ordering an accounting. On appeal from the final decree the Court of Appeals (Judges Wilbur, Sawtelle and Garrecht) refused to hear anything but questions arising from the accounting. Judge Wilbur said (p. 181):

> "The first question of importance which presents

itself upon the question of damages is the effect of the adjudication in the interlocutory decree that the defendant has infringed the patent. In this connection it should be stated that the statement of evidence in the record contains the evidence which was adduced at the time of the hearing prior to the issuance of the interlocutory decree. This evidence, we think, has no place in the record, in view of the fact that the interlocutory decree was not appealed from, and is conclusive upon the parties."

Here is a conflict even within the Circuit. *O'Nate* v. *Bahr* was not referred to in the decision of the Court of Appeals herein, nor expressly overruled. It was decided by a different set of Judges (Judges Haney and Stephens) with the exception of Judge Garrecht.

Point 4. The Decision of the Court of Appeals Construes Title 28, U.S.C. Secs. 227 and 227a in a Manner Conflicting with Fundamental and Settled Principles of Appellate Procedure.

(a) The Decision is in Conflict with the Settled Rule of Federal Appellate Practice that a Party Who Fails to Appeal from an Appealable Decree, or Who Fails to Raise Questions on a Previous Appeal Which He Could Have Raised, Waives His Right to be Heard Thereon and Cannot Raise the Same Questions in Any Subsequent Appeal.

This rule is based on the common law rule that every man is entitled to his day in court, but that does not mean two days in the Court of Appeals—the construction the Court of Appeals has given to Secs. 227 and 227a.

See:

Hill v. *Chicago & Evanston Railroad Co.*, 140 U.S. 52 at 53–55 (1890).

Sutton v. *Gulf Smokeless Coal Co.*, 77 Fed. (2d) 439 at 441 (C.C.A. 4, 1935).

United States v. *Van Blargen,* 60 F. (2d) 874 at 875 (C.C.A. 3, 1932).

Casals v. *Fernandez,* 40 Fed. (2d) 831 at 832 (C.C.A 1, 1930).

Sun Co. v. *Vinton Petroleum Co.,* 248 Fed. 623 at 625 (C.C.A. 5, 1918).

Guaranty Trust Company v. *International Pump Co.,* 242 Fed. 920 at 921 (C.C.A. 2, 1917).

Quinton v. *Neville,* 154 Fed. 432 at 434 (C.C.A. 8, 1907).

Burns v. *Cooper,* 153 Fed. 148 at 151 (C.C.A. 8, 1907).

Chase v. *Driver,* 92 Fed. 780 (C.C.A. 8, 1899).

Congress, in permitting appeals from interlocutory decrees in certain instances and decrees which are final except for accounting, *intended to avoid the expense of unnecessary accountings,* not to give a defendant an option of two appeals on the merits. The Appeal Statutes should not be construed contrary to this settled rule.

(b) The Decision is in Conflict with the Settled Rule of Federal Appellate Practice That Where Separate Appeals Are Permitted in Various Stages of a Litigation, Questions Decided on the First Appeal (or Which Could Have Been Decided) Will Not Be Re-Examined on the Second Appeal. The Second Appeal Brings Up Nothing but the Proceedings Subsequent to the Mandate on the First Appeal.

See for instance:

Illinois v. *Illinois Central Railroad Co.,* 184 U.S. 77 at 91–93 (1901) and cases cited therein.

United States v. *Camou,* 184 U.S. 572, 575 (1901).

In re Potts, 166 U.S. 263, 267 (1896).

Smith v. *Vulcan Iron Works,* 165 U.S. 518 at 525-526 (1896).

In re Sanford Fork & Tool Co., 160 U.S. 247 at 255 (1895).

Roberts v. *Cooper*, 20 How. 467 at 481 (1857).
United States v. *Bollman*, 81 F. (2d) 1009 at 1010 (C.C.A. 8, 1936).
Keeler v. *Fred T. Ley & Co.*, 65 F. (2d) 499 at 501 (C.C.A. 1, 1933).
Turner v. *Kirkwood*, 62 F. (2d) 256 (C.C.A. 10, 1932).
Bissell Carpet Sweeper Co. v. *Goshen Sweeper Co.*, 72 F. 545, 555 (C.C.A. 6, 1896).
Gregory v. *Pike*, 77 Fed. 241 (C.C.A. 1, 1896).
5 Corpus Juris Secundum, Sec. 1830 (p. 1286).

The Court of Appeals herein has construed Title 28, U.S.C. Secs. 227 and 227a contrary to this settled principle. Congress did not intend to abrogate this fundamental rule by permitting appeals from certain interlocutory and final decrees in Sections 227 and 227a.

(c) The Decision is in Conflict with the Settled Rule of Federal Appellate Practice that Fragmentary or Piecemeal Appeals in the Same Litigation Raising Different Points Successively in Different Appeals on the Same Record Will Not be Permitted.

This rule is fundamental. It was for this reason that originally appeals could be had only from final decrees. It was not the intention of Congress to weaken or to make exceptions to this rule in any way, in permitting appeals from an interlocutory decree under Sec. 227. The Court of Appeals herein should have construed the statute in a manner to prevent conflict with this fundamental principle.

In *McLish* v. *Roff*, 141 U.S. 661 (1891), for instance, this Court construed an appeal statute to avoid conflict with this fundamental rule. There Mr. Justice Lamar said (p. 665):

> "*From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error* (with the single

exception of a provision in the act of 1875 in relation to cases of removal, which was repealed by the act of 1887), *have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal. Forgay* v. *Conrad,* 6 How. 201, 204. *The construction contended for would render the act under consideration inconsistent with this long established object and policy. More than this, it would defeat the very object for which that act was passed.*"

Additional cases are:

Heike v. *United States,* 217 U.S. 423, 429.
Forgay v. *Conrad,* 6 How. 201 at 206 (1848).
Arnold v. *United States,* 263 U.S. 427 (1923).
Collins v. *Miller,* 252 U.S. 364–370 (1919).
Rexford v. *Brunswick, Balke Company,* 228 U.S. 339 at 346 (1912).
Covington v. *Covington First National Bank,* 185 U.S. 270 at 277 (1901).
Southern Railway Company v. *Postal Telegraph Company,* 179 U.S. 641 at 644 (1900).
Cole v. *Rustgard,* 68 F. (2d) 316 (C.C.A. 9, 1933).
Wright v. *Taft-Peirce Mfg. Co.,* 287 Fed. 131 (C.C.A. 1, 1923).
Satterlee v. *Harris,* 60 F. (2d) 490 at 491 (C.C.A. 10, 1932).

The decision of the Circuit Court of Appeals herein, if permitted to become settled law, will promote fragmentary or piecemeal appeals rather than prevent them. This is particularly shown by those cases where the decree in the District Court is split, and in favor of both plaintiff and defendant, in both granting and refusing an injunction, as where certain claims of patent are held invalid, and others

valid and infringed. Under Tit. 28, U.S.C. Sec. 227 as it now reads, both parties *may* appeal from the interlocutory decree before accounting. But if the decision of the Court of Appeals herein becomes law, if only one party appeals from the interlocutory decree, he may have the merits considered by the Court of Appeals. The merits of appellee's case, not appealed, are not considered.* If plaintiff's claim is sustained, the accounting proceeds. Thereafter the other party may appeal from the final decree after accounting, and raise the same questions as to the merits he might have raised had he also appealed. The result is two appeals on the merits in the same case before it can be finally disposed of—the very fragmentary or piecemeal appeals the Courts ordinarily will not permit.

Cases permitting this are:

Stromberg Motor Devices Co. v. *Arnson,* 239 Fed. 891 (C.C.A. 2, 1917—suit for infringement of two patents).

Groblewski v. *John Chmiell Co.,* 264 Fed. 325 (C.C.A. 1, 1919—suit for infringement of four trademarks and unfair competition).

Kelsey Wheel Co. v. *Universal Rim Co.,* 296 Fed. 616 (C.C.A. 6, 1924—suit for infringement of two patents).

Draper Corp. v. *Stafford Co.,* 255 Fed. 554 (C.C.A. 1, 1918—suit for infringement of a patent—two claims held valid, three claims invalid).

These cases present a "much debated and troublesome question."** This evil is entirely avoided, if the party fail-

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* Examples are:
Jacobs v. *Iodent Chemical Company,* 41 F. (2d) 637 at 638 (C.C.A. 3, 1930.
Ward Baking Co. v. *Weber Bros.,* 230 Fed. 142 (C.C.A. 3, 1916).
Ensten v. *Simon, Ascher & Co.,* 282 U.S. 445, at 448 (1930).

** Denison C. J. in *Kelsey Wheel Co.* v. *Universal Rim Co.,* 296 Fed. 616 at 619 (C.C.A. 6, 1924).

ing to appeal from the interlocutory decree *after final hearing* under Secs. 227 and 227a be held to have *waived* his right to be heard on the merits of the matters decided by such interlocutory decree. *There should be but one appeal on the merits in the Court of Appeals—exactly as when appeals were permitted only from final decrees.* Congress did not intend to change that fundamental rule, in permitting appeals from interlocutory decrees before accounting.

The Rules of Civil Procedure (Rules 13 and 18) now permit and require each party to state as many claims or counterclaims as he may have against the opposing party—to enable the District Court to decide all controversies between the parties *at one trial, so far as feasible. By the same token, the merits of all controversies between the parties should also be heard in one hearing in the Court of Appeals as well, and not in fragmentary and piecemeal appeals.* The decision of the Court of Appeals herein, if it becomes law, will prevent this.

The number of such split decrees in the District Courts will necessarily increase under the enlarged scope of the new Rules of Civil Procedure. Fragmentary appeals therefrom may well be expected to overburden the dockets of the Circuit Courts of Appeal, now already overcrowded in several instances,* if the decision of the Court of Appeals herein is not reversed by this Court.

B. THE EFFECT OF FAILURE TO EXCEPT TO THE MASTER'S REPORT AS TO VALIDITY.

As to this, the Court said (R. p. 790):

> "Appellee contends that since appellant failed to except to the master's findings that the patent was not anticipated, or wanting in novelty and was valid, such findings are now conclusive. Appellant contends that

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* The Court of Appeals for the Sixth Circuit is already nearly two years behind in its hearing of cases after docketing.

> the findings are really conclusions of law and exceptions thereto are unnecessary. This court holds to the contrary. *Reinharts, Inc.* v. *Caterpillar Tractor Co.*, 9 Cir. 85 F. (2d) 628, 630, cert. den. 302 U.S. 694. However, pursuant to Federal Rules of Civil Procedure, Rule 52(b) 'the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings'. We think such question may be raised here."

The Court of Appeals in so ruling is so clearly wrong and has so far departed from the accepted and usual course of judicial proceedings as to require the exercise of this Court's power of supervision, we respectfully submit.

It was, of course, settled beyond any dispute, prior to the Rules of Civil Procedure, that a party cannot raise questions in a Court of Appeals to which he has failed to except in the Master's report.

Equity Rule 66, *in effect September 4, 1935, the date of the Master's report,* expressly provided:

> "The master, as soon as his report is ready, shall return the same into the clerk's office and the day of the return shall be entered by the clerk in the Equity Docket. *The parties shall have twenty days from the time of the filing of the report to file exceptions thereto, and if no exceptions are within that period filed by either party, the report shall stand confirmed.*"

See, for instance:

Underwood Typewriter Co. v. *E. C. Stearns & Co.*, 227 F. 74 at 83 (C.C.A. 2, 1915).

Topliff v. *Topliff*, 145 U.S. 156 at 173 (1891).

Burns v. *Rosenstein*, 135 U.S. 449 at 455–6 (1889).

Tennessee Publishing Co. v. *Carpenter*, 100 F. (2d) 728, 732 (C.C.A. 6, 1938).

Savage v. *Monarch Royalty Co.*, 64 F. (2d) 650 at 651 (C.C.A. 10, 1933).

Cromwell v. *Skinner*, 62 F. (2d) 432 at 435 (C.C.A. 10, 1933).

Evans v. *Crown Gas & Oil Co.*, 245 F. 933 (C.C.A. 3, 1917).

The Court of Appeals did not question this previously required procedure in equity, but held that Rule 52b of the Rules of Civil Procedure had intervened to relieve respondent from the necessity of excepting the Master's report as to validity. *But the Rules of Civil Procedure did not become effective until September 16, 1938—three years after Respondent failed to file the exceptions required by the then existing Equity Rules!* The Rules of Civil Procedure have no retroactive effect. Under Rule 86 they were to

> "govern all proceedings in *actions brought after they take effect* and also all *further proceedings* in actions then pending."

Point 1. The Decision of the Court of Appeals in Giving the Rules of Civil Procedure a Retroactive Effect of Three Years Is In Conflict with Previous Decisions of That Court and of Other Circuit Courts of Appeals.

In *Hill* v. *Ohio Casualty Ins. Co.*, 104 F. (2d) 695, (C.C.A. 6, 1939), an action at law tried without a jury to recover upon an insurance policy, the plaintiff failed to request any special findings of fact or conclusions of law. The only question was whether the intervening Rules of Civil Procedure (Rule 52) relieved the plaintiff from the necessity of so doing. The Court said (p. 696):

> "The difficulty is that as applicable to this case the rule was not effective. The action was brought on January 23, 1937, or more than nineteen months before the effective date . . .

"Appellant's case was not pending in the District Court on September 16, 1938. It had long since been terminated there, being dismissed on May 31, 1937. The appeal was allowed and the bill of exceptions was filed on July 23, 1937, and the transcript was filed in this court on September 21 following."

In *Nielson* v. *Utah Construction Co.*, 104 F. (2d) 887 (C.C.A. 9, 1939), the same Judges made a ruling *contrary to their decision herein* as to the retroactive effect of the Rules of Civil Procedure, in a suit in equity to determine water rights. The Court of Appeals affirmed the District Court in dismissing an amended petition, which joined defendant's successor in title, for lack of joint liability, under Equity Rule 26—despite the fact that such joinder was then permissible under Rule 18 of the Rules of Civil Procedure, (p. 892).

As to the District Court's action in transferring the case from equity to the law side, although the Rules of Civil Procedure in the meantime had abolished the distinction between law and equity, the Court (by Judge Garrecht) said (p. 892):

"The order of the Court at the time it was entered (March 10, 1938) conformed to the rules then in force and should not now be abrogated."

The same Court, composed of the same judges, has thus ruled oppositely on the same point in two different cases!

In *Leach* v. *Ross Heater & Mfg. Co.*, 104 F. (2d) 88 (C.C.A. 2, 1939), a suit for patent infringement, the plaintiff moved to voluntarily dismiss prior to September 16, 1938, but the decision thereon was not rendered until later. Judge Paterson said (p. 90):

"We are of opinion that the motion to dismiss was governed by the practice in equity prevailing when the

motion was argued and submitted for decision. Rule 86 of the present rules provides:

* * * * * *

"The effective date for the new rules was September 16, 1938. As to actions pending when the rules took effect, only 'further proceedings' in an action are governed by the new rules. The motion to dismiss, a motion made, argued and submitted for decision in August, 1938, was a past proceeding on September 16, 1938, not a further proceeding. See *Weber* v. *Hartzell*, 8 Cir., 230 F. 965; *Lyon* v. *Pennsylvania R. Co.*, 119 Misc. 380, 196 N.Y.S. 562."

In *Schlaefer* v. *Schlaefer*, 112 F. (2d) 177 at 181–182, (C.A.D.C. 1940) a proceeding for sequestration of property, the Court held that jurisdiction acquired over the defendant by acts constituting a general appearance, made prior to September 16, 1938, was not defeated because such acts could not constitute a general appearance under the Rules of Civil Procedure—which had no retroactive effect.

To the same effect are:

City of El Paso v. *West*, 104 F. (2d) 96 at 97 (C.C.A. 5, 1939).

Taylor v. *Merrill*, 104 F. (2d) 710 at 712 (C.C.A. 9, 1939).

George Allison & Co. v. *I. C. C.*, 107 F. (2d) 180 at 181 (C.A.D.C. 1939).

Tighe v. *Maryland Casualty Co.*, 99 F. (2d) 727 at 728 (C.C.A. 9, 1938).

The Act* authorizing the promulgation of the Rules of Civil Procedure further expressly provided that they

"shall neither abridge, enlarge, nor modify the substantive rights of any litigant."

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* Act of June 19, 1934, c. 651, Sec. 1; 48 Stat. 1064; 28 U.S.C. Sec. 723b.

The petitioner here, by respondent's failure to except to the Master's report in Sept., 1935, acquired the substantive right that respondent could not further question the validity of the patent. This right has been abridged by the decision of the Court of Appeals herein, in violation of the statute authorizing the Rules of Civil Procedure.

CONCLUSION.

We respectfully submit the Petition for Writ of Certiorari should be granted, because:

1. The public interest in the avoidance of unnecessary accountings, and the great expense and waste caused thereby, and of fragmentary and piecemeal appeals, which already overburden the dockets of the Circuit Courts of Appeal, urgently requires a decision by this Court, construing Title 28, U.S.C. Secs. 227 and 227a, and determining the effect of a failure to appeal from an interlocutory decree granting an injunction *after final hearing,* and which is final except for accounting. This important question, although frequently arising and resulting in conflicting decisions, has never been, but should be, expressly decided by this Court.

2. The decision of the Court of Appeals herein as to respondent's failure to except to the Master's Report on validity of the patent, is contrary to and in conflict with the decisions of that Court and other Circuit Courts of Appeal, and so far a departure from the accepted and usual course of judicial proceedings, as to plainly require the exercise of the Court's powers of supervision.

3. If respect for the law and the courts is to be maintained, the conduct of judicial proceedings by adherence to the established rules of procedure, and the decision of cases according to applicable law, is essential. The present case, we submit, is a flagrant instance wherein a court has ignored the established rules of procedure, the set-

tled rules of statutory construction, including the intent of Congress, and the previous decisions of this and other Courts, to reach a desired—but, under the circumstances, an improper—result, because the question was not before the Court; and it clearly calls for the exercise of this Court's powers of supervision.

WHEREFORE, it is prayed that the Court grant the Petition for Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit herein.

Respectfully submitted,

GEORGE P. DIKE,
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August 6, 1941.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 497

LEONARD L. EDWARDS,
Petitioner,

vs.

BINGHAM PUMP COMPANY, INC., a corporation,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No._____

LEONARD L. EDWARDS,
Petitioner,

vs.

BINGHAM PUMP COMPANY, INC., a corporation,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The Petitioner seeks to review a decision of the Circuit Court of Appeals for the Ninth Circuit in a patent infringement suit. The decision, reported in 118 F. (2d) 338 (Record p. 786) reverses a final decree of the District Court of Oregon which had sustained the validity of the patent, decreed infringement, and allowed damages.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

This suit was brought by the petitioner in the United States District Court for the District of Oregon to enjoin the infringement of letters patent No. 1,927,395 granted to him September 19, 1933, covering an alleged improvement in gear pumps in providing for removable and replaceable liners between the gears and the pump housing. The plaintiff alleged infringement and damage, and sought an injunction against the former, and a money judgment for the latter. (R. pp. 1, 9, 10). The defendant answered denying that plaintiff was the original, first or sole inventor of the improvement claimed in the patent, denied the validity thereof, denied infringement, alleged that the patent was void for want of novelty, and alleged anticipation by others. (R. pp. 11, 12, 16, 17 and 18). The District Court referred the case to a master (R. p. 21) who heard evidence and entered a report September 4, 1935 (R. p. 23) finding Claims 7 and 8, which were those relied on, to be valid, unanticipated and infringed by the respondent, and recommended a decree enjoining the defendant from using the patented device and for an accounting on damages. Respondent filed exceptions to the master's report, and specifically excepted to all conclusions of law upon the ground that the evidence was insufficient to support findings upon which to base the conclusions (R. pp. 49, 50). Respondent's exceptions were overruled (R. p.

55) and an interlocutory decree entered, holding Claims 7 and 8 valid and infringed, and enjoining defendant from further infringement, and referring the case to a special master for an accounting. (R. pp. 62, 64). Respondent filed a petition for rehearing of the interlocutory decree and order overruling exceptions to the master's report (R. p. 65), and a supplementary petition for rehearing to give defendant an opportunity to take depositions covering prior knowledge and use (R. p. 80). The motion for rehearing and supplementary petition and motion to remand to the master for further evidence were denied by the District Court March 23, 1936 (R. p. 84). Respondent then filed a petition to reopen and reconsider and tendered an amended answer setting up the invalidity of the patent by reason of anticipation, and that Edwards was not a pioneer in the art (R. p. 85). The tendered amended answer again denied the validity of the patent or that plaintiff was the original, first or sole inventor, alleged anticipation by reference to prior issued patents and specific manufacture and use by four separate pump companies, denied infringement and alleged the existence of numerous alternative, non-infringing pump liners (R. pp. 91-109). The District Court referred the petition to reopen and reconsider on the issues raised by the amended answer to the same special master (R. p. 118). The special master made report in which he stated he had considered the various anticipations alleged in the amended answer, and found that they did not anticipate plain-

tiff's patent, and therefore recommended that the proposed amended answer be not allowed or filed, and assessed damages (R. pp. 153, 197).

The respondent filed exceptions to the master's report calling attention to the fact that plaintiff was aware of all the alternative liners in evidence before the master prior to the trial on the question of infringement; that he was not a pioneer inventor; that defendant should have been permitted to file its amended answer; excepted to the master's finding that the alleged anticipating devices did not anticipate (R. p. 199). District Judge John H. McNary, having died in the meantime, the case was reargued before Judge James A. Fee, who heard arguments on the question of patentability, re-examined the question, stated that the court had passed upon the matter many times as shown by the record (R. p. 220), and accepted the determination by the master and by Judge McNary, and held that no proper basis had been shown to the court to set aside those findings (R. p. 223). The District Court entered a final decree on October 9, 1939 (R. p. 242) in which he found Claims 7 and 8 valid, infringed by respondent, decreed a permanent injunction, and granted judgment against respondent for $8500.00.

While the exceptions taken to the master's report are not artificially perfect, it is clear from the record that at all times during the proceedings in the District Court the respondent insisted upon the invalidity of plaintiff's patent and brought the matter

to the master's and to the court's attention time after time.

The respondent did not appeal from the interlocutory order, but appealed from the final decree.

The Circuit Court of Appeals reversed the District Court upon patents cited as anticipation in the answer (R. pp. 17 and 18) and found in the patent office file wrapper (R. pp. 642-752).

PETITIONER SPECIFIES FOUR ERRORS IN THE DECISION OF THE CIRCUIT COURT OF APPEALS

1. That the court erred in considering validity and infringement on appeal from a final decree because those questions were waived by respondent's failure to appeal from the interlocutory decree;

2. That the Circuit Court of Appeals had no jurisdiction to consider validity and infringement because respondent did not appeal from the interlocutory decree;

3. That the Circuit Court of Appeals erred in holding it was not precluded from considering validity and infringement because of respondent's alleged failure to except to the master's finding as to validity;

4. That the Circuit Court of Appeals erred in reversing and not affirming the District Court as to validity and infringement.

THE QUESTIONS OF LAW INVOLVED

1. Are Secs. 227 and 227a, Title 28 U.S.C.A., mandatory or permissive?

2. Has a litigant the right in patent cases to await until final decree before appealing to the Circuit Court of Appeals on the questions of validity and infringement?

3. Does failure to appeal from an interlocutory decree of validity and infringement close the door to inquiry in respect to these questions where an appeal is taken from a final decree which independently found both validity and infringement?

4. Is an appellate court barred from considering plain and serious error apparent on the record, even though no or an imperfect exceptions was taken to a master's report?

5. Has an appellate court the inherent power, at its option, to correct plain and serious error, even though not assigned or excepted to?

ARGUMENT

No interlocutory decree is final where it is necessary to refer the case to a master as a subordinate court and for a judicial purpose as to state an account between the parties upon which a further and final decree has been entered.

McGourkey v. T. & O. C. Ry., 146 U. S. 536, 545.

Such has been the universal ruling with regard to patent cases.

Ex parte Enameling Co., 201 U. S. 156, 160,
Barnard v. Gibson, 7 How. 650,
Smith v. Vulcan Iron Works, 165 U.S. 518, 524.

Until the passage of Sec. 227 (Title 28 U.S.C.A.) appellate courts had no jurisdiction over interlocutory decrees, and the aggrieved litigant was compelled to await a final decree.

Smith v. Vulcan Iron Works, 165 U. S. 518, 524.

Until the passage of Sec. 227a (Title 28 U.S.C.A.) there could be no appeal from an interlocutory decree where the patent had expired prior to the entry of the interlocutory decree. This because Sec. 227 permitted such an appeal only from an order granting, refusing or dissolving an injunction, and no injunction could issue when a patent had expired.

Senate Report 1319 (69th Congress, Second Session, January 25, 1927),

House Report 1890 (69th Congress, Second Session, Reporting Corresponding House Bill 11840).

Every court which has considered Secs. 227 and 227a (Title 28 U.S.C.A.) has held the right to take an appeal from an interlocutory decree to be permissive and optional and not mandatory. There is no

conflict in the decisions among the circuits, or otherwise, in this regard.

Marden v. Campbell Printing-Press & Mfg. Co., 67 F. 809, 811 (First C.C.A.)

The court there say:

> "It is, however, entirely plain that the appeal given by the seventh section of the act referred to is a privilege or option, and in no way affects or diminishes the right to appeal from the final decree; and as the defendants below, on receiving from this court an oral intimation of the views above expressed, elect to dismiss their appeal, without prejudice to their right to take any other appeal which the law may give them, and without prejudice to the questions which may thus be raised, we permit them so to do."

In

Jones Brothers Co. v. Underkoffler, 24 F. Supp. 393,

the court uses the following language:

> "Section 129, supra, does not divest this court of jurisdiction to reconsider questions passed upon by an interlocutory decree before entering a final order. Section 129 grants the privilege or option to take an appeal from an interlocutory decree granting an injunction. Failure to exercise this option by taking a preliminary appeal, however, in no way affects the right to have the court reconsider the interlocutory order before entering a final decree, or the right to appeal from the final decree. Marden v. Campbell Printing Press, etc., 1 Cir., 67 F. 809; Ex Parte National Enameling & Stamping Co., 201 U. S. 156, 26 S. Ct. 404, 50 L. Ed. 707."

Again, in

A. & R. Realty Co. v. Northwestern Mut. Life Ins. Co., 95 F. (2d) 703, 707 (Eighth C. C. A.),

the matter is again and fully discussed:

> "In Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co., 6 Cir., 72 F. 545, 555, it was held in an opinion by Judge (later Mr. Justice) Lurton that if, upon an appeal from an interlocutory order, the appellate court is required to pass upon the merits of the case, a second appeal from the final decree, which challenges the same interlocutory order can involve only matters affecting such order which have transpired subsequent to the entry thereof, or, in other words, that the appellate court cannot be required to review the same order twice upon the same grounds. *The converse of this ruling would be that where no appeal had been taken from the interlocutory order or where, if taken, the appellate court was not required to and did not pass upon the merits of the controversy in deciding the appeal, a subsequent appeal from the final decree could properly challenge the validity of the interlocutory order and invoke a decision upon the merits.*" (Italics ours.)

Again, in

Victor Talking Mach. Co. v. George, 105 F. (2d) 697, 699 (Third C. C. A.),

the same rule is laid down. This case is peculiarly in point because the alleged infringer of a copyright attempted to appeal from an interlocutory decree which established validity and infringement. The Circuit Court of Appeals retained jurisdiction, holding that the decree was final. On certiorari being

allowed, the Supreme Court reversed the Circuit Court of Appeals because the appeal had not been taken within the thirty days prescribed by statute. The District Court in a final decree thereupon awarded damages to plaintiff, and defendant appealed from the final decree. The court say:

> "The language of the statute is not ambiguous. A party, feeling himself aggrieved by an interlocutory decree of the kind mentioned, is given the right to appeal without awaiting a final decree, upon condition that he take his appeal within thirty days. The statute, however, does not require an aggrieved party to take such an appeal in order to protect his rights, and, where it is not taken, does not impair or abridge in any way the previously existing right upon appeal from the final decree to challenge the validity of the prior interlocutory decree. The aggrieved party may, therefore, await the final determination of the case and upon appeal therefrom raise all questions involved in the case. A. & R. Realty Co. v. Northwestern Mut. Life Ins. Co., 8 Cir., 95 F. 2d 703. All interlocutory orders and decrees from which no appeal has been taken are merged in the final decree. Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U. S. 251, 36, S. Ct. 269, 60 L. Ed. 629; Individual Drinking Cup Co. v. Errett, 2 Cir., 297 F. 733; Western Union Telegraph Co. v. United States & Mexican Trust Co. et al., 8 Cir., 221 F. 545; Nashville Syrup Co. v. Coca Cola Co., 6 Cir., 215 F. 527, Ann. Cas. 1915B, 358. We conclude that upon this appeal from the final decree we have jurisdiction to review the question of the defendant's liability as well as the questions raised by the accounting."

Petition for certiorari from the Circuit Court decision holding the copyright invalid was denied in 308 U. S. 611. A motion for rehearing was denied in 308 U. S. 638, and a motion for leave to file a second petition for rehearing was denied in 309 U. S. 693. It is obvious that if the Circuit Court of Appeals had no right to determine the merits of the case on appeal from the final decree, certiorari would have been allowed.

To the same effect is,

Chapman v. Yellow Poplar Lumber Co., 143 F. 201, 205 (Fourth C. C. A.).

In,

Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co., 72 F. 545, 560 (Sixth C. C. A.),

the court say:

> "The conclusion we have reached is in the line of the relief intended by Congress to be afforded suitors whose rights are affected by temporary submission to an inconclusive decree. The right to appeal at that stage of the cause is optional. If one affected by the action of the court in allowing, dissolving or continuing an injunction see fit, he may await a final decree, and then appeal."

To the same effect is

Baker v. Waller Baker & Co. Ltd., 83 F. 3, 5,

where the court say:

> "If the defendant is dissatisfied, he can carry the case to the Circuit Court of Appeals, provided

> he makes his appeal within thirty days from the entery of the order. If he suffers this period to elapse, his only remedy is by an appeal after final decree. See Chicago Dollar Directory Co. v. Chicago Directory Co., 65 F. 463; Boston & A. R. Co. v. Pullman's Palace-Car Co., 51 F. 305."

This rule is so firmly established without conflict or variation that the rule is laid down in 8 Hughes Federal Practice, Sec. 5833, p. 302, as follows:

> "An appeal taken from an interlocutory order or decree is a privilege or option and in no way affects or diminishes the right to appeal from the final decree; but if the merits of the case have been determined by the appellate court, in reversing an interlocutory decree, they are not open to reconsideration at a later stage of the same case either in that court or in the court below."

Petitioner insists that the purpose of Secs. 227 and 227a is to compel appeals from interlocutory orders that both parties may be relieved from the expense of further litigation. He overlooks, however, that each of these sections specifically provides that proceedings in other respects in the District Court shall not be stayed unless otherwise ordered by the court, or appellate court, or a judge thereof. Petitioner's position baldly stated is this: That, notwithstanding an appeal from an interlocutory order, the successful party in the lower court has the right to proceed with an accounting, all to appellant's loss and expense, but if appellant does not avail himself

of an appeal from an interlocutory order, but appeals from a final decree, his opponent can insist that he has lost his right to question validity and infringement because the opponent has been put to the expense of an accounting.

If Congress had intended to make mandatory, instead of optional, an appeal from an interlocutory decree, it would have provided that upon such an appeal further proceedings in the District Court would be stayed until the appeal was decided. It would not have left the matter so unfair and one-sided as petitioner's construction of the statute compels.

CASES RELIED ON BY PETITIONER AS DEMONSTRATING CONFLICTS BETWEEN THE CIRCUITS ARE INAPPLICABLE

Petitioner relies on,

Ensten v. Simon, Ascher & Co., 282 U. S. 445, 457, 458;

Ensten v. Rich-Sampliner Co., 13 F. (2d) 132;

Austin-Western Machinery Co. v. Disc Grader Co., 291 F. 301, 303;

O'Nate v. Bahr, 67 F. (2d) 180, 181 (Ninth C. C. A.).

Ensten v. Simon, Ascher & Co., 282 U. S. 445, 457, 458,

has no application to the question decided by the Circuit Court of Appeals for the Ninth Circuit in this case, namely, that the question of the validity

of the patent may be raised by appeal from the final decree of the District Court as well as by an appeal from an interlocutory decree of that court.

The question before the Supreme Court in the *Ensten* case was whether or not the patentee had been guilty of unreasonable delay in filing his disclaimer. The District Court by its interlocutory decree held four patent claims valid and claim 2, the only one in question, invalid. The infringer, under the provisions of Section 129 Judicial Code appealed from that part of the decree holding four claims valid, but the patentee did not appeal from that portion holding claim 2 invalid. The patentee did not file his disclaimer for nearly two years after the adverse decision of the District Court. The court held that it was the duty to make *prompt* disavowal; that he was bound to,

> "disavow the right as soon as he discovers that it has been unjustly claimed. Unreasonable delay in disclaiming is thus tantamount to an original fraudulent claim, and through it the patentee loses the privilege of making the amendment by which alone his patent could be saved. * * * When a competent court has declared his pretentions without sufficient foundation, we think good faith and the spirit of the enactment demand that he act with such promptness as the circumstances permit, either to vindicate his position or to relieve the public from further evil effects of his false assertion. * * * Certainly, in this case where an appeal was taken by the defendants it would have entailed no unreasonable hardship upon the patent owner promptly to have submitted the

> legality of the rejected claim for determination by the appellate court. The route to that end was obvious, easy, inexpensive. He deliberately failed to defend his assertion of right by appealing. He has been guilty of unreasonable delay and has not brought himself within the beneficent provisions of the statute."

All that this court decided was that where a disclaimer statute required promptness of disavowal as soon as the patentee discovered he had inadvertently claimed a patent monopoly to which he was not entitled and when a lower court held that one of his claims was invalid, he must either disclaim or take the first avenue of appeal available to him to contest that court's ruling.

This court did not hold or suggest that an appeal upholding a patent claim could only be taken from an interlocutory decree; that question was not before it.

Such likewise was the holding in a companion case, that of,—

Ensten v. Rich-Sampliner Co., 13 F. (2d) 132.

Austin-Western Road Machinery Co. v. Disc, Grader & Plow Co., 291 F. 301, likewise has no relevancy to the questions here involved, nor does it constitute even by inference any conflict in decision among the Circuit Court of Appeals.

The appellate court had directed the entry of a decree in favor of the patentee grader company and

ordered the issuance of an injunction and an accounting. On appeal from the decree for reasonable royalties the infringer for the first time directed the attention of the Circuit Court of Appeals to the fact that there was no proof in the original case, or in the then record of any notice of infringement or statutory mocking of the device. This point was first raised in the infringer's reply brief, it had never been raised in the District Court nor before the Master and was not assigned as error on appeal. Properly the Circuit Court of Appeals held that by this "long continued silence" the infringer had waived the point and was concluded by the decree of the court of appeals on appeal from the interlocutory decree where it was adjudged that plaintiff recover from the defendant "any and all damages which plaintiff had sustained since the date of issuance of the patent and the date of the commencement of the suit." It is further noted that no appeal had been taken to the Supreme Court from that decree and the only appeal was from the judgment on the accounting.

Again there is nothing to suggest even the existence of the question here raised and decided by the Ninth Circuit adversely to the petitioner Edwards.

O'Nate v. Bahr, 67 F. (2d) 180, 181 (9th Cir.).

This case is cited by petitioner as being in conflict with the Ninth Circuit's own decision in the instant case. The case was discussed in the briefs of

both parties before the Circuit Court of Appeals. An examination of the original record in *O'Nate v. Bahr* disclosed that the question was not before the court. The assignments of error dealt with the propriety of allowing damages where the patentee had neither pleaded nor proved a statutory marking of the patented article or notice to defendant of the patent. For some inexplicable reason the appellant had included in his statement of evidence the testimony introduced at the time of the hearing as to validity and infringement. The court of appeals with justifiable impatience criticized this practice of loading a record with matter not relevant to the questions raised on the appeal, saying:

> "This evidence, we think, has no place in the record, in view of the fact that the interlocutory decree was not appealed from, and is conclusive upon the parties."

It then proceeded to say:

> "Inasmuch as no issue was raised upon the subject of a notice, the entry of the interlocutory decree of the court cannot amount to an implied finding upon that subject (lack of statutory marking and notice to defendant)."

The case is no authority on the question here raised because it was not before the court for decision. The law pertaining thereto was not discussed in any of the briefs of the parties and was not before the court for decision and was not in fact decided, the case going off on an entirely different issue.

Suffice it to say that when the Circuit Court of Appeals for the Ninth Circuit actually had before it the question of whether failure to appeal from an interlocutory decree of validity of a patent barred an examination of the question on appeal from a *final* decree, it promptly held that it did not, in that respect following the universal rulings of other Federal Courts.

ANSWER TO PETITIONER'S POINT IV WITH SUBDIVISIONS a, b and c.

(Petitioner's Brief, pp. 23 to 28)

Petitioner's Point IV, with its three subdivisions a, b and c is addressed to the question of whether or not the decision of the Circuit Court of Appeals construes Secs. 227 and 227a, Title 28 U.S.C.A., in a manner conflicting with fundamental and settled principles of appellate procedure.

He cites some thirty-one decisions, none of which construes either of these sections as petitioner claims they should be construed. It is to be regretted that his meticulous research failed to discover the cases heretofore cited in our brief, showing that the construction given to these sections by the Circuit Court of Appeals is in strict accord with all cases which have decided the precise matter.

The propositions laid down in the cases which petitioner cites are so far from those here involved that to discuss them would divert attention from our present question. In an appendix to this brief we

have analyzed the principal cases, concisely stating the questions involved and the decisions rendered.

It is enough to say in answer to the argument supporting Point IV that respondent sought but one day in the Circuit Court of Appeals, not two; that as to Point IV (b), respondent did not attempt to have examined in his second appeal issues which were or could have been decided in a first appeal. He took but one appeal in which he raised all the questions decided by the lower court's final decree, exercising the option given him by the statute and universally recognized by all courts.

In reply to Point IV (c), respondent has no quarrel with the cases cited. The point of petitioner's argument seems to be that if the trial court held certain claims valid and certain invalid, and the patentee appealed from that portion of the interlocutory decree holding invalidity, and the defendant did *not* appeal from the portion decreeing validity, but awaited final decree, this would result in piecemeal appeal. The argument is pointless. Under petitioner's theory of proper practice there would be one appeal on the question of validity and the second appeal on the question of damages. The supposititious case which he assumes would result in one appeal by the patentee from the interlocutory order decreeing invalidity of certain claims and a second appeal by the defendant after final decree raising the question of validity as to the remaining claims, as well as questions of accounting. Such has always been in accordance with the rules of

federal procedure and involves no departure. If Congress had intended to change the practice, it would have done so by language clearly understandable, and the various courts of appeal, which, as we have heretofore shown, have considered the matter, would have so concluded. Congress having failed to make a change in the practice, it remains as it always has been.

Oddly enough, respondent by appealing from the final decree has brought about a single appeal of all questions, instead of indulging in the piece-meal practice which petitioner condemns.

PETITIONER'S POINT B
(Petitioner's Brief, pp. 28-32)

THE EFFECT OF ALLEGED FAILURE TO EXCEPT TO THE MASTER'S REPORT AS TO VALIDITY OF PATENT

1. Respondent did not appeal from the master's report, but from a final decree.

2. The District Court in rendering its interlocutory and final decrees considered all the evidence offered before the master (R. pp. 57 and 237). In its final decree it considered and determined the question of validity (R. pp. 221, 222 and 223).

3. The District Court heard arguments before interlocutory decree and final decree upon, and decided adversely to the respondent, the question of

validity (R. pp. 220, 221 and 223). Therefore, it cannot be said that the question of validity was first raised in the Circuit Court of Appeals.

RESPONDENT'S PROPOSITION NO. I.

A final decree merges all preceding interlocutory orders, which, until final decree, remain under the control and subject to the revision of the court, and upon appeal from the final decree every interlocutory order affecting the rights of the parties regarding the matters and questions between them is subject to review in the appellate court and may be determined.

Perkins v. Fourniquet, 47 U. S. 206, 208;

Forgay v. Conrad, 6 How. 201, 206;

Celluloid Mfg. Co. v. Cellanite Mfg. Co., 40 F. 476, 477;

Pittsburgh C. & St. L. Ry. Co. v. B. & O. R. R. Co., 61 F. 705, 708;

Western Union Telegraph Co. v. U. S. & M. T. Co., 221 F. 545, 551;

Herman Body Co., et al. v. St. Louis Body & Equipment Co., et al., 46 F. (2d) 879 (Eighth C.C.A.)

We quote from *Perkins v. Fourniquet*, 6 How. 206, 208:

> "And the appellant is not injured by denying him an appeal in this stage of the proceedings, because these interlocutory orders and decrees remain under the control of the circuit court,

and subject to their revision, until the master's report comes in and is finally acted upon by the court, and the whole of the matters in controversy between the parties disposed of by a final decree. And, upon an appeal from that decree, every matter in dispute will be open to the parties in this court, and may all be heard and decided at the same time."

Western Union Telegraph Co. v. U. S. & M. T. Co., 221 F. 545, 551;

Perkins v. Fourniquet, 47 U. S. 206, 208;

Forgay v. Conrad, 6 How. 201, 206;

Celluloid Mfg. Co. v. Cellanite Mfg. Co., 40 F. 476, 477;

Pittsburgh C. & St. L. Ry. Co. v. B. & O. R. R. Co., 61 F. 705, 708;

N. K. Fairbanks Co. v. Windsor, 124 F. 200, 202.

RESPONDENT'S PROPOSITION NO. II.

The rule prescribing exceptions to the master's report is one of convenience and not jurisdictional. A master's report is advisory to the court appointing him, and that court and every appellate court has the inherent power to correct plain, serious or clearly erroneous errors contained in the master's report or in the decree of any subordinate or *nisi prius* tribunal.

Sheffield, etc. Ry. Co. v. Gordon, 151 U. S. 285, 291;

New York Central Ry. Co. v. Johnson, 279 U. S. 310, 318;

Brassfield v. U. S., 272 U. S. 448, 450;

Central Improvement Co. v. Cambria Steel Co., 210 F. 696, 699.

Stromberg Motor Devices Co. v. Zenith-Detroit Corp., 73 F. (2d) 62, 64, 65 (Second C.C.A.);

United States v. Atkinson, 297 U. S. 157, 160;

Rip Van Winkle Wall Bed Co. v. Holmes, 15 F. (2d) 950 (Ninth C.C.A.)

We deem it necessary only to quote from,

Central Improvement Co. v. Cambria Steel Co., 210 F. 696, 699.

"A consideration after argument of all the facts relating to this issue which the master found in his report convinced this court that the concusion lawfully deducible from them was that the Southern Company was liable to pay to the Trust Company the debt which the Belt Company owed it. Counsel for the Southern Company now insist that this court was without power to consider or correct this conclusion of the master which the court below followed, and that the Trust Company must suffer the loss of this amount because its counsel did not state in its exception that the conclusion was wrong on the merits of the issue. They invoke the conceded general rule that where no exception is taken to the master's report it will be deemed to be true, and where exceptions to parts of it are taken the parts to which no exception is taken will stand as correct and will not be open to review in an appellate court. Burns v. Rosenstein, 135 U. S. 449, 10 Sup. Ct. 817, 34 L. Ed. 193; Provident Life & Trust Co. v. Railway Co., 177 Fed. 854, 859, 101 C. C. A. 68. But this rule, like most rules of law or practice, is not without its

exceptions. In Sheffield, etc. Ry. Co. v. Gordon, 151 U. S. 285, 291, 14 Sup. Ct. 343, 344 (38 L. Ed. 164), the Supreme Court, while holding the exceptions in that case insufficient to present the questions argued, said:

> " 'It is true that, if the report of the master is clearly erroneous in any particular, it is within the discretion of the court to correct the error; but we see no occasion for exercising such discretion in this case.'
>
> "In 2 Daniell's Chancery Pleading & Practice, at page 1314, it is said that it is entirely discretionary with the court to grant an opportunity to except to a report after it has been absolutely confirmed."

The rules of this court provide that the court may at its option notice a plain error not assigned or specified.

> Rule 27, Subdivision 6.
>
> *Mahler v. Eby*, 264 U. S. 32, 45.

A like provision is found in the rules of the Circuit Court of Appeals for the Ninth Circuit. (Rule 11.)

The rule last cited provides:

> "Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court at its option may notice a plain error not assigned."

Even though the error be not plain and not assigned, yet if it is serious the court will consider it.

Briscoe v. Rudolph, 221 U. S. 547, 550;

United States v. Tennessee & Coosa R. R. Co., 176 U. S. 242, 256;

United States v. Pena, 175 U. S. 500, 502.

Courts exist to administer justice between the parties. The sole function of appellate courts is to correct errors of law and fact committed by inferior courts. In the orderly administration of Justice all courts have the right to make rules and regulations governing proceedings before them, and to insist that if a party desires correction of judicial error, he shall in plain and timely fashion point out that error to the court. A court may properly decline to consider error not excepted to or not assigned; this, however, in the interests of orderly procedure. All courts, however, have the inherent right and power, when in their opinion plain, serious or obvious error has been committed, to correct it irrespective of exceptions or assignments of error. Any other rule would result in arid formalism destructive of the judicial function.

If the trial court or subordinate appellate court sees fit to correct errors not excepted to or assigned, such exercise of judicial discretion does not form the basis for a write of certiorari. The Circuit Court of Appeals is no more subject to criticism for the exercise of that discretion than would this court if

it make a like determination. That is not to say, however, that if the Supreme Court is of the opinion that the Circuit Court of Appeals was in error in holding the patent invalid it may not review that decision, but petitioner's brief does not point out any error committed by the Circuit Court of Appeals in so doing.

APPLICABILITY OF RULE 52(b) RULES OF CIVIL PROCEDURE

This rule was properly applied by the Circuit Court of Appeals. The petitioner insists that because the new rules were not in effect at the time the master rendered his report on validity, or at the time of the entry of the interlocutory decree, the new rules cannot be resorted to.

Rule 52 (b) provides that:

> "When findings of fact are made in actions tried by the court without a jury the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the District Court an objection to such finding, or has made a motion to amend them, or a motion for judgment."

The obvious purpose of this rule is to relieve a party from defeat in an appeal where no objections were made to the finding. The only purpose of objections and exceptions is to pave the way for presentation of alleged error to an appellate court. The

trial court has ample power *sua sponte* to correct its own mistakes. The effect of Rule 52 (b) is to require the appellate court to recognize error even though no objection or exception was taken thereto in the court below.

Here the appeal was taken more than two years after the new rules went into effect (effective date new rules, September 16, 1938). It was the duty of the Circuit Court of Appeals to dispose of the appeal, at least so far as assigned error was concerned, in accordance with the new rules, this because Rule 86 provides:

> "They govern all proceedings and actions brought after they take effect, and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies."

Petitioner suggests no reason why it is not feasible to apply Rule 52 (b) to this appeal, or any reason why its application would work injustice. If the decree of the District Court was erroneous and it wrongfully upheld a patent monopoly, it is both just and feasible that such error be corrected. Petitioner does not suggest that by reason of the application of the new rules he was deprived in the lower court of ample opportunity to prove the validity of his patent. The burden of so doing was always on him, for the issue of validity was raised by the answer.

The invalidity of his patent and lack of invention on his part is plainly disclosed by the Patent Office file wrapper. Such was and is respondent's contention. The Circuit Court of Appeals so held.

The application of Rule 52 (b) deprived petitioner of no rights; it conferred no jurisdiction on the appellate court which it did not otherwise possess, and it resulted in the correction of a plain, obvious and serious error. There is a public interest in setting aside as invalid a patent monopoly which was erroneously or inadvertently granted.

Atlantic Co. v. Brady, 107 U. S. 192, 200.

CONCLUSION

The petition for certiorari does not present any questions warranting review by the Supreme Court of the United States:

(a) It involves no decision of a state court on any federal question;

(b) It is not in conflict with the decision of any other Circuit Court of Appeals on the same matter, but on the contrary is in accord with all of them;

(c) It does not decide any question of local law in a way probably in conflict with local decisions;

(d) It does not decide any important question of federal law which has not been and should be decided by this court;

(e) It does not decide a federal question in a way

probably in conflict with applicable decisions of this court, but in accordance with well established rules of law;

(f) It does not depart from the accepted and usual course of judicial proceeding.

In so far as it reviews a final decree, even though an appeal might have been taken from the interlocutory decree, it followed the universal rule accepted by all of the courts. In so far as it examined and decided errors alleged not to have been excepted to, it exercised an inherent power and discretion possessed by all courts. In so far as it applied the new rules abolishing the necessity for objection and exceptions, it was right, but even if in error, it was merely a matter of procedure which in view of the fact that the new rules have been in effect for three years will not arise again and is of no importance.

The petition for certiorari is without merit, the questions raised do not present the required questions of importance, and it should be denied.

Respectfully submitted,

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APPENDIX

ANALYSIS OF CASES CITED BY PETITIONER IN SUPPORT OF POINT IV (a)

(Petitioner's Brief, pp. 23, 24)

Hill v. Chicago & Evanston R. R. Co., 140 U. S. 52, at 53-55.

A decree was entered final as to some of the defendants and interlocutory as to others. No appeal was taken from that portion of the decree which was final. Held, that the decree was severable; that on appeal from a subsequent decree fixing the amount recoverable from those defendants over whom the court retained jurisdiction, the propriety of the previous decree dismissing the appeal as to other parties was not open for examination, they being no longer parties to the suit.

Sutton v. Gulf Smokeless Coal Co., 77 F. (2d) 439, 441.

After appeal from an interlocutory decree and remand to the District Court to assess damages, on appeal from the latter no question decided in the former appeal was open for examination.

United States v. Van Blargen, 60 F. (2d) 874, 875.

There was no appeal from a final decree, but an attempt by independent proceedings to set aside the decree for lack of service, which was allowed, and,

on appeal by the government, defendant attempted to have merits of final decree re-examined. Held, question of service only was before the appellate court.

Casals v. Fernandez, 40 F. (2d) 831, 832.

After two trials and two appeals, a rule of evidence had been established and on final judgment legitimacy of a child declared. No appeal having been taken from the adjudication as to the rule of evidence, it was not open for re-examination.

Sun Company v. Vinton Petroleum Co., 248 F. 623, 625.

An appeal taken from an interlocutory decree. On remand trial court refused to consider cross complaint. On appeal from final decree, over vigorous dissent, Circuit Court of Appeals held decision on previous appeal decided all matters raised or which could have been raised.

Guaranty Trust Co. v. International Pump Co., 242 F. 920-921.

A final decree provided for taxation of costs against intervenor in appeal taken by him. Affirmed, and on remand costs were taxed. On appeal from such taxation, held that decision by Circuit Court of Appeals on appeal from final decree which contained proviso for such taxation, complainant could not reopen the question.

Quinton v. Neville, 154 F. 432, 434.

A final decree directed sale of real estate to satisfy a lien. No appeal taken, but a writ of review was sought which was denied. Held, on appeal from a supplementary order directing sale by special master instead of by private sale, the question of validity of the final decree could not be raised.

Burns v. Cooper, 153 F. 148, 151.

An appeal was taken from a final decree subjecting to the lien of a mortgage not only the wife's life estate, but after acquired interest therein. Reversed, holding that only life estate was subject to lien. After remand, the wife asked for a decree leaving open the question, whether she had less than a life estate. The trial court refused, and on appeal from that decision it was held that the first appeal settled the nature of her estate and the question was *res judicata*, particularly in view of the fact that on first appeal she had insisted that her interest was a life estate.

Chase v. Driver, 92 F. 780.

After final decree mortgaged property was sold and sale confirmed. No appeal taken therefrom. After accounting to determine whether there was a deficiency between amount derived from sale and amount due mortgagee, the redemptionor appealed and sought to challenge the provisions of the final decree of sale and order of confirmation. Held, he was foreclosed from so doing.

AUTHORITIES CITED BY PETITIONER IN SUPPORT OF POINT IV (b)

Illinois v. Illinois Central R. R. Co., 184 U. S. 77, at 91-93.

On appeal from a final decree the court fixed the rights of the parties dependent on the existence or non-existence of certain facts and remanded the case for determination of those facts. From the decree making such determination an appeal was taken and appellant endeavored to raise questions decided on a previous appeal. Held, to be *res judicata*.

United States v. Camou, 184 U. S. 572, 575.

Held, that where appellate court has issued its mandate a second writ of error brings up only errors in proceedings subsequent to the mandate.

In re Potts, 166 U. S. 263, 267.

On an earlier appeal the Supreme Court held patent valid and infringed and remanded case for further proceedings. Held, that lower court, without express leave of Supreme Court, could not grant new trial for newly discovered evidence, or permit new defenses to be brought in by amendment.

To the same effect are,

Roberts v. Cooper, 20 How. 467, 481;
United States v. Bollman, 81 F. (2d) 1009, 1010;
Keeler v. Fred T. Ley & Co., 65 F. (2d) 499, 501;
Turner v. Kirkwood, 62 F. (2d) 256;
Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co., 72 F. 545, 555.

Gregory v. Pike, 77 F. 241, merely holds that a rule of law laid down by the appellate court in one appeal is the law of the case and cannot be re-examined.

CASES CITED UNDER PETITIONER'S POINT IV (c)

McLish v. Ruff, 141 U. S. 661,

holds that appeal does not lie from a demurrer to the jurisdiction of the court, but must await the final decree.

Heike v. United States, 217 U. S. 423,

holds that no appeal lies from a special plea in bar claiming immunity from prosecution, but must await a final judgment.

Forgay v. Conrad, 6 How. 201, 206.

The court criticized the lower court for making a decree final by authorizing an execution to enforce the same and retaining jurisdiction for certain other related matters. Later cases, such as *McGourkey v. Toledo & Ohio C. Ry. Co.*, 146 U. S. 536, 545, and *Beebe v. Russell*, 19 How. 283, 287, distinguish, if they do not criticize *Forgay v. Conrad* by pointing out that the fact that execution has been awarded was the only ground upon which the finality of the decree could be supported.

Arnold v. United States, 263 U. S. 427,

holds that a decree for the amount of the penalty of a public contractor's bond retaining jurisdiction to

determine the amount due the subcontractors and materialmen is an interlocutory and not a final decree.

Collins v. Miller, 252 U. S. 364-370,

held that a writ of habeas corpus, which was allowed as to one charge and denied as to two others, but retained the accused to await further action of the District Court was not final, but interlocutory, and no appeal would lie.

Rexford v. Brunswick-Blake-Colender Co., 228 U. S. 339,

held that no appeal would lie from an order which determined the question of title, but which referred to the master the question of the identity of trees which the defendants were entitled to remove was interlocutory and not final.

Covington v. Covington First Nat'l. Bank, 185 U. S. 270, 277,

permanently enjoined the assessment and collection of taxes upon defendant's capital stock for all periods prior to March 21, 1900, and retained jurisdiction with regard to assessments made between the date of the entry of the judgment and the expiration of defendant's existing articles of incorporation. Held, to be an interlocutory and not a final decree and unappealable.

Southern Ry. Co. v. Postal Telegraph Co., 179 U. S. 641.

In a condemnation suit before damages were assessed no appeal could be taken from an order sustaining a demurrer to the defendant's answer because not final.

Cole v. Rustgard, 68 F. (2d) 316,

holds that an order quashing service of summons is not appealable because not final.

Wright v. Taft-Peirce Mfg. Co., 287 F. 131,

holds that an order granting a new trial is not a final order and therefore not appealable.

Satterlee v. Harris, 60 F. (2d) 490, 491,

held that an order denying an application by creditors to dismiss their claims without prejudice was not final and unappealable.

(19)

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CHARLES ELMORE CROPLEY
CLERK

In the

Supreme Court of the United States.

OCTOBER TERM, 1941.

No. 497.

LEONARD L. EDWARDS,
Petitioner,

v.

BINGHAM PUMP CO., INC., a Corporation,
Respondent.

REPLY BRIEF FOR PETITIONER
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Petitioner respectfully requests leave to reply briefly to Respondent's Brief in opposition, in view of the public importance of the questions involved.

A. THE EFFECT OF FAILURE TO APPEAL FROM THE INTERLOCUTORY DECREE (FINAL EXCEPT FOR ACCOUNTING).

Respondent's brief completely ignores the principal point of the petition—that respondent's failure to appeal from the interlocutory decree (*final* except for accounting) *caused the same unnecessary accounting it was Congress' purpose to prevent* in permitting appeals from an interlocutory decree granting an injunction, and decrees final except for accounting, under Title 28, U.S.C., Secs. 227 and 227a. If

respondent had so appealed, it could have obtained a complete review on the merits on such appeal, and prevented an unnecessary accounting. In failing to appeal, and causing the unnecessary accounting, respondent should suffer the usual penalty—be deemed to have waived his right to be heard on the merits of the matters concluded by the interlocutory decree (final except for accounting).

Respondent's Brief leaves these questions still unanswered:

> Where the Appeal Statutes (now Title 28, U.S.C., Secs. 227 and 227a), theretofore permitting appeals only from final decrees *after* accounting, are amended by Congress, to permit an appeal *before* accounting (from an interlocutory decree granting an injunction, and which is *final* except for accounting) and thereby obtain a complete review on the merits *before accounting, and so avoid a possible unnecessary accounting,* can a defendant defeat the express purpose of Congress and *cause such unnecessary accounting,* merely by withholding his appeal until the final decree *after* accounting? Or, shall the purpose of Congress be achieved by subjecting such a defendant to the usual penalty of one who fails to appeal from an appealable decree,—that he be deemed to have waived his right to be heard on the merits of all matters concluded by the decree entered *before* accounting?

Naturally, the Appeal Statutes should be construed to achieve, rather than to defeat, the purpose intended by Congress. There is no reason whatsoever why this cannot be done here. The Appeal Statutes can be thus construed, we respectfully submit, by holding **that when there has been a final hearing on the merits** *and an interlocutory decree is entered granting an injunction and which is* **final except for accounting,** *the defendant desiring to be heard on the*

merits should appeal within 30 days from the entry of such decree, or be deemed to have waived his right to be heard on the matters concluded by such decree. By the same token, if there has been a split decree, refusing the plaintiff an injunction in certain respects, the plaintiff should also appeal from the same decree within 30 days, if he desires to be heard on the merits of the refusal of the injunction. In this manner, the intent of Congress can be achieved, the unnecessary accounting, and piecemeal appeals, can be avoided, and the objective of one complete trial on the merits in the District Court, and one complete review on the merits in the Court of Appeals, attained.

The Appeal Statutes have not been so construed previously* in several cases for four reasons:

1. The courts have lost sight of the purpose intended to be achieved by Congress,—the avoidance of unnecessary accountings—in permitting appeals from interlocutory decrees granting an injunction, and decrees which are final except for accounting, under Title 28, U.S.C., Secs. 227 and 227a.

2. The courts have uncritically followed old authorities like *Marden* v. *Campbell Printing Press Co.*, 67 F. 809 (C.C.A. 1, 1895) without examining the legislative history of Title 28, U.S.C., Sec. 227 and 227a and amendments thereto, and not realizing that the construction of the Appeal Statute made therein in 1895, when a *plaintiff* could not appeal from an interlocutory decree *refusing* an injunction, and justifiable at that time to avoid piecemeal appeals, now reaches the opposite result and *causes* piecemeal appeals, now that the Appeal Statute (Sec. 227) permits appeals *by both parties* from an interlocutory decree both granting or *refusing* an injunction.

3. Other courts have apparently been misled by the words

*** Save in those cases cited in Petitioner's Main Brief on Petition, Point 3, Pages 22-23.**

"interlocutory decree" in Sec. 227, and have regarded this as meaning a decree granting or refusing a *temporary* injunction, heard on motion and ex parte *affidavits.* They have not realized that a decree *entered after final hearing on the merits,* which orders an accounting, is also an *interlocutory* decree.* Naturally a defendant who fails to appeal from an *interlocutory* decree granting a *temporary* injunction, can still appeal on the merits from a *final* decree granting a *permanent* injunction, but by the same token on appeal from the *final* decree, he should not assign as error the granting of the *temporary* injunction, that question being concluded by his failure to appeal from the earlier decree. But the evil intended to be prevented by Congress—the avoidance of unnecessary accountings—is not caused by a defendant's failure to appeal from a decree granting a *temporary* injunction, as no *accounting* is ever ordered except after *final* hearing on the merits.

4. Some courts have apparently been misled by the permissive language of the Appeal Statutes (Title 28, Sec. 227, 227a)—that "an appeal *may* be taken from such decree". They have thought that because Congress did not use the word *"must"*, that an appeal from an interlocutory decree, or decree which is final except for accounting, is only *optional* or *permissive.* But, no litigant *must* appeal from any decree, if he does not wish to. But, if he fails to appeal, when a timely appeal gives him full opportunity to be heard on the merits and will prevent an unnecessary accounting, he is properly deemed to have waived his right to be heard thereon, in accordance with settled appellate practice. Practically every Federal Appeal Statute is couched in *permissive* language—even those relating to appeals from *final* judgments or decrees (Title 28, U.S.C., Sec. 230),

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* *George* v. *Victor Talking Machine Co.*, 298 U.S. 377 (1934), and cases therein cited.

from which a party *must* appeal if he is ever to be heard thereon.

The result has been that for many years* the great economic waste of unnecessary accountings, and needless expense to litigants, and the great waste of the time and energy of the Courts of Appeal in being required to consider the same questions twice on separate and piecemeal appeals of both parties, have been tolerated and permitted by the courts, only because they have failed to examine the legislative background of the Appeal Statutes and the objectives intended by Congress in amending them, and have failed to construe the statutes in accordance with established principles of appellate procedure. A wasteful and archaic appellate procedure has thus been tolerated for many years by the Courts of Appeal wholly unnecessarily, without realizing that complete relief lay in their own hands in a proper construction of the Appeal Statutes. This court many times has had to correct the lower courts in their misapplication of legal principles and misconstruction of statutes, but at no time, we truly believe, could its pointing out the correct rule of decision bring greater relief to the harassed and helpless litigant in as many cases, as in the present instance. We know no question of appellate procedure in greater need of clarification by this Court. The question is constantly arising and may in fact arise in any case in which an injunction and accounting is sought. The greater incidence of split decrees, resulting in increased numbers of fragmentary appeals and further clogging of the dockets of the Courts of Appeal, to be expected under the new Rules of Civil Procedure, has already been pointed out.†

The remedy for this deplorable situation plainly lies with this Court. Unless this Court intervenes now by granting the

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* Since 1911, when the present Sec. 227 was again amended to permit appeals by the plaintiff from the interlocutory decree *refusing* an injunction, and since 1927, in the case where the patent has expired before decree.

† Petitioner's Main Brief—p. 28.

present petition, the prospect that the situation can ever be corrected by the Courts of Appeal becomes well nigh hopeless, as this Court's apparent tacit approval of the doctrine of *Victor Talking Machine Co.* v. *George*, 105 F. (2d) 697 at 699 (C.C.A. 3, 1939) by denying certiorari therein will normally preclude any Court of Appeals from ever re-examining the question. The situation can then only get increasingly worse, until public clamor against the senseless practice of compelling highly expensive accountings before a case is heard on its merits on appeal, when a defendant fails to appeal from the interlocutory decree after final hearing and before accounting, again compels Congress to act, as it did in 1891, but this time to make its intention clearer and even more explicit! The remedy is clear. The defendant who causes this unnecessary expense in this manner should suffer the usual penalty of one who fails to appeal from one appealable decree—be deemed to have waived his right to be heard thereon. The great waste and delays to litigants in the meantime, however, have been caused solely because the courts have failed in their task of statutory construction. We respectfully submit that the need for intervention by this Court in settling this "much debated and troublesome question" is clear and urgent.

Respondent's Brief in no wise weakens petitioner's contentions.

The implied argument (Brief p. 12) that petitioner's contentions are inconsistent with the provisions of Sections 227 and 227a that "proceedings in other respects in the District Court shall not be stayed during the pendency of such appeal unless otherwise ordered by the Court" is without merit. *The universal practice is to suspend accounting proceedings pending an appeal from the interlocutory decree before accounting.* The Committee in Senate Report 1319, accompanying Senate Bill 4957, which became Title 28, U.S.C., Sec. 227a (Petitioner's Main Brief, pp. 19–20), thus said:

"Upon the entry of such a decree an appeal from the Order granting the injunction may be taken immediately *and it is the general practice to suspend all proceedings under the accounting until the Court of Appeals has determined the questions of validity of the patent and infringement.* If the Court holds against the plaintiff on either of those questions, it reverses the decree of the lower court, *and there is, of course no accounting.*"

The reasonableness of petitioner's construction of the Appeal Statutes (Title 28, U.S.C., Sections 227 and 227a) can scarcely be disputed. The desirability of a complete review on the merits by the Court of Appeals *after final hearing and before an extensive accounting* is so obvious as not to require argument. Congress was convinced of that in 1891, and thought it had provided the remedy! *Respondent's whole argument in essence is* (Brief, p. 20) *that Congress did not make its intention clear enough.* But such an argument is applicable to any statute ever enacted by Congress or any Legislature,—statutes which are being interpreted every day by the Courts. This Court in fact, provided the necessary clue to proper construction of the Appeal Statutes in *Smith* v. *Vulcan Iron Works,* 165 U.S. 518 at 525 (1896) when it set forth the "manifest intent" of Congress in permitting appeals from an interlocutory decree granting an injunction, but this has strangely been overlooked by the lower Courts.

The rule contended for by petitioner here is in fact the law in Wisconsin, where appeal statutes similar to the present Federal statutes exist. In *Kickapoo Development Corp.* v. *Kickapoo Orchard Co.,* 231 Wis. 458 (1939) a trade-mark infringement and unfair competition case, an interlocutory decree granting an injunction and awarding an accounting was entered after final hearing, from which defendant failed

to appeal. The Court held on defendant's appeal from the final decree *after* accounting, that the merits of the interlocutory decree were not in issue, and only the questions raised by the accounting could be considered. Justice Wickhem said (p. 467):

> "The first question here relates to the finality of the interlocutory judgment and is raised by the contention that while the time to appeal, the interlocutory judgment had passed, the whole matter was fully within the control of the trial court until entry of the final judgment. This contention cannot be sustained. Sec. 270.54 Stats. provides in part:
>
> " 'In case of a finding or decision substantially disposing of the merits but leaving an account to be taken * * * in order fully to determine the rights of the parties an interlocutory judgment may be made disposing of all issues covered by the finding or decision and reserving further consideration until the report, verdict, or subsequent finding.'
>
> "Sec. 274.09 Stats. provides, so far as material here:
>
> " '. . . Appeals may be taken from interlocutory judgments.'
>
> "In *Richter* v. *Standard Manufacturing Co.*, 224 Wis. 121, 271 N.W. 14, this court held that, *being appealable, an interlocutory judgment must be appealed from just as any other judgment, and that if appeal is not taken within the time limited it cannot be reviewed upon appeal from the final judgment.*"

See also:

Richter v. *Standard Mfg. Co.*, 224 Wis. 121 at 125-6 (1937).

We respectfully urge therefore, that the decision of the Court of Appeals herein is plainly contrary to, and defeats

the express intent of Congress, and that the public interest in the avoidance of unnecessary accountings and their attendant expense, and in the avoidance of fragmentary and piecemeal appeals, which already overburden the dockets of the Circuit Courts of Appeal, requires a decision now by this Court construing Title 28 U.S.C., Sec. 227 and 227a, and determining the effect of failure to appeal from an interlocutory decree granting an injunction *after final hearing,* and which is *final* except for accounting.

B. THE EFFECT OF FAILURE TO EXCEPT TO THE MASTER'S REPORT AS TO VALIDITY.

It remains undisputed in Respondent's Brief that respondent excepted September 24, 1935 to the Master's Report and his findings as to infringement *but not as to the validity of the patent* (R. pp. 48–50). Respondent thus indicated its election at that time to abandon its defense of invalidity, and to rely solely on non-infringement.

Respondent's brief wholly ignores the express provision of Federal Equity Rule 66 in effect at that time, and the rule, settled beyond any dispute, that *a party cannot raise questions in a Court of Appeals to which he has failed to except in the Master's report* (authorities, Petitioner's Main Brief, pp. 29–30).

The rules of this Court and of the Court of Appeals for the Ninth Circuit *as to assignments of error,* of course, have no bearing on a failure to except to a Master's Report.

We believe it essential to the due administration of justice in the United States that cases be decided according to settled rules of procedure and that courts should not reach out to decide questions not raised by the pleadings and not properly before them. The Court of Appeals herein, we submit, has most flagrantly violated this fundamental concept.

We respectfully submit, therefore, that the decision of

the Court of Appeals herein as to respondent's failure to except to the Master's Report on validity of the patent is clearly contrary to the law applicable at that time, and in conflict with the decisions of that Court itself and other Circuit Courts of Appeal, and so far a departure from the accepted and usual course of judicial proceedings as to plainly require the exercise of this Court's powers of supervision.

Wherefore, for the reasons stated, it is prayed that the Court grant the Petition for Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit herein.

Respectfully submitted,

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September 25, 1941.